

# WORKER MISCONDUCT AND THE DENIAL OF CLAIMS UNDER THE EMPLOYEES' COMPENSATION ORDINANCE

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*An often overlooked feature of the Employees' Compensation Ordinance is that an employee who meets the basic requirements for a claim can nonetheless be denied compensation under certain provisions of the Ordinance, if his misconduct or his contribution to the injury is viewed as sufficiently serious. These provisions are rarely resorted to, but their potential should not be under-estimated. Moreover, these provisions overlap with each other, and contain certain internal contradictions. They also overlap with and to some degree contradict certain of the provisions establishing the basic qualifying conditions for compensation. This article will explore recent and historical case law in which these provisions have been interpreted and applied, and will consider the extent and effect of the overlap between them and the extent to which they overlap with and contradict the basic qualifying conditions. Some simple suggestions for reform will be proposed.*

## Introduction

The Employees' Compensation Ordinance<sup>1</sup> is an insurance-supported scheme, requiring employers to pay compensation for work-related injuries, in the case of temporary incapacity calculated according to the extent and duration of the disability, and in the case of permanent incapacity or death, a lump sum calculated according to the age of the worker and his monthly salary at the time of injury or death, and subject to ceilings provided in the Ordinance.<sup>2</sup> Enacted in 1953,<sup>3</sup> and modelled on the UK Workmen's Compensation Act 1897, the Ordinance is a product of late nineteenth century liberal thinking, that workers perform vital functions that are to be encouraged, however much

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<sup>1</sup> Cap 282, Laws of Hong Kong.

<sup>2</sup> At the time of the introduction of the Ordinance in 1953, the English Acts on which it is based were already deemed outdated there and had been replaced (in 1946) by a system of national insurance.

<sup>3</sup> In its original form enacted as the Workmen's Compensation Ordinance. The Ordinance was renamed the "Employees' Compensation Ordinance" in 1980.

they may involve personal risks, and that compensation for work-related injuries must be guaranteed, regardless of employer's fault, to avoid the injured worker having to rely directly on the State for social welfare assistance.<sup>4</sup>

As such, a successful application for compensation under the Employees' Compensation Ordinance does not require the injured worker to show that he was injured by his employer's fault. Rather, he need only show that he was an employee, working under a contract of service, and that he was "injured by accident arising out of and in the course of employment".<sup>5</sup> If these conditions are satisfied, the worker is *prima facie* entitled to compensation under the Ordinance. Any contribution to the accident or injury attributed to the worker's conduct is normally irrelevant to the outcome of the claim, and there is certainly no provision for apportionment, as exists in the common law of negligence.

However, the Ordinance does provide for the possibility that a worker, otherwise satisfying the basic entitlement conditions, can be denied his claim. He can be denied his claim for compensation if his conduct in bringing about the accident or the worsening of his injury attracts the application of certain disqualifying provisions (hereafter sometimes referred to as the "misconduct provisions"). These provisions have been in place in the Hong Kong legislation since its introduction in 1953. They are different in certain material respects from those contained in the UK Workmen's Compensation Acts, and so must, to some degree, be considered on their own terms. Moreover, they overlap with some of the qualifying conditions, making for a sometimes convoluted process of assessment of worker's conduct and its impact on the compensation claim. This article will explore recent and historical case law applying these provisions, and will consider the relationship of these provisions with each other, and with the basic qualifying conditions. Certain internal contradictions, arising at least in part due to the drafting, will be identified and considered on their own terms and in the context of the case law.

### Requirements for Entitlement to Compensation

Workers or their dependants who wish to make a claim for compensation are not put to a heavy proof. The Ordinance is remedial, designed to ensure immediate and certain compensation, and so the qualifying conditions are

<sup>4</sup> For a history and background of the Ordinance, see Chen and Ng, *The Workers' Compensation System in Hong Kong: Retrospect and Prospect* (Hong Kong: Centre of Asian Studies, University of Hong Kong, 1987).

<sup>5</sup> Note 1 above, s 5(1).

set at a fairly low threshold. The operative provision is to be found in section 5(1) of the Ordinance:

“... if in any employment, personal injury by accident arising out of and in the course of the employment is caused to an employee, his employer shall be liable to pay compensation in accordance with this Ordinance.”

This requirement can be broken down into four qualifying conditions: employment (contract of service); injury by accident;<sup>6</sup> accident arising in the course of the employment; and accident arising out of the employment. Section 5(4)(a) simplifies the proof by deeming that an accident that arises in the course of the employment shall be deemed to arise out of the employment unless there is evidence to the contrary. Moreover, other deeming provisions, in sections 5(4)(b)–(g) can be relied on to prove the basic qualifying conditions. These qualifying conditions, although at times technical in interpretation and application, and posing problems of their own, have recently been explored elsewhere,<sup>7</sup> and will not be discussed here, save to consider the degree of overlap and contradiction that may exist with the misconduct provisions.

### The Misconduct Provisions

Despite its essentially no-fault character, the Employees' Compensation Ordinance has always contained provisions disqualifying certain workers and their dependants from compensation, even those who have satisfied the basic entitlement conditions. These provisions are there to serve as an incentive to workers, in order to encourage safe behaviour.<sup>8</sup> The relevant provisions are to be found in sections 5(2)(b) and (d), and 5(3) of the Ordinance:<sup>9</sup>

<sup>6</sup> By virtue of s 32(1), an occupational disease (listed in the Second Schedule) will be treated as an injury by accident for the purposes of an award of compensation.

<sup>7</sup> Rick Glofcheski, “Connecting the Injury with the Employment in the Proof of Employees' Compensation Claims” in Young and Jen (eds) *Law Lectures for Practitioners 2005* (Hong Kong: Sweet & Maxwell Asia, 2005), pp 1–25.

<sup>8</sup> Or, in the less optimistic view of an early judicial commentator, “if no check was placed on the workmen, they might recklessly induce accidents of a serious character affecting many lives and much property”: per Lord James of Hereford in *Johnson v Marshall, Sons & Co Limited* [1906] AC 409 at p 412.

<sup>9</sup> Subsection 5(2)(a) states the obvious proposition that no compensation will be paid if the injury did not incapacitate the employee from earning wages at work at which he was employed, and is not considered here. Subsection 5(2)(c) can disentitle a worker from compensation, but here the conduct does not concern work-related conduct, but misrepresentations regarding previous injuries. Hence, it is not the subject of this article, which is concerned with workers' conduct that disentitles him from compensation. At any rate, there are no Hong Kong cases known to the author in which this provision has been considered or applied.

- “5(2) No compensation shall be payable under this Ordinance in respect of –
- (b) any incapacity or death resulting from a deliberate self-injury
  - ...
  - (d) any injury, not resulting in death or serious and permanent incapacity, caused by an accident which is directly attributable to the employee's addiction to drugs or his having been at the time of the accident under the influence of alcohol.
- 5(3) In any proceedings under this Ordinance where it is proved that the injury to an employee is attributable to the serious and wilful misconduct of that employee, or that an injury by accident arising out of and in the course of his employment is deliberately aggravated by the employee, any compensation claimed in respect of that injury shall be disallowed; except that where the injury results in death or serious incapacity, the Court on consideration of all the circumstances may award the compensation provided by this Ordinance or such part as it shall think fit.”

These provisions are the only ones in the Ordinance that speak to the question of fault, and they are confined to employee's fault. It is important to note that they do not operate like contributory negligence in the common law, but take an all-or-nothing approach, disentitling the applicant to all compensation if one of them applies.

There was nothing in the UK Workmen's Compensation Acts comparable to sections 5(2)(b) and (d) of the Hong Kong Ordinance. Those Acts contained only one disqualifying provision, concerned with serious and wilful misconduct. The Hong Kong provisions were added by the draftsman at the time of enactment in 1953 in order to ensure that compensation was to be denied in the circumstances contemplated by those provisions. Such matters could arguably be included as “serious and wilful misconduct” under section 5(3), but the inclusion of sections 5(2)(b) and (d) puts the matter beyond doubt.

It is to be observed that section 5(2)(b), concerned with deliberate self-injury, results in a complete denial of compensation, without a conferral of discretion to decide otherwise; section 5(2)(d), concerned with accidents attributable to drug addiction or the influence of alcohol, also results in a denial of compensation but not if death or serious incapacity occurs, in which case the section has no application; and section 5(3), concerned with serious and wilful misconduct or deliberate aggravation of an injury, may also result in a denial of compensation, but if, as in section 5(2)(d), death or serious incapacity results, the court (unlike section 5(2)(d)) has a

discretion whether or not to allow compensation. In regard to the latter, it is to be observed that the Ordinance does not provide any guidance to indicate what considerations are relevant to the exercise of that discretion.

It is evident that the facts of a given case could fall into both of section 5(3) and either of section 5(2)(b) or (d), resulting in dramatically different outcomes. This overlap has been considered by the Hong Kong courts on only one occasion, and will require further consideration below.

These misconduct provisions are not raised by employers with the frequency that one might expect, and therefore have not pre-occupied the courts to the same degree as have the basic qualifying conditions found in section 5(1) of the Ordinance. As such, their import is not as well understood, particularly their relationship with the basic qualifying conditions. Nonetheless, they are raised from time to time, and when raised successfully, can have the effect of disentitling a claimant to compensation despite having satisfied the qualifying conditions. For this reason, an understanding of these provisions, their relationship with each other, and their relationship to the basic qualifying conditions, is vital.

### **The Possibility of Overlap with Section 5(1)**

The first problem in understanding the import of the misconduct provisions is the overlap that exists with the section 5(1) qualifying conditions that the injury is caused by “accident arising out of and in the course of the employment”. An employee’s misconduct triggering an accident may not require a consideration of the misconduct provisions because the injury may already be found not to have been caused by “accident arising out of and in the course of employment”. Where the events causing the injury are found to be unrelated to the employment, as where they involve a worker’s suspension of his employment in the pursuit of a purely personal activity, or where they concern a private dispute with the assailant who attacked the employee, or where the injury is not caused “by accident”, the employee’s misconduct will not require a consideration of its contribution to the accident or injury under sections 5(2)(b) or (d), or section 5(3). In this sense, the existence of sections 5(2) (b), (d) and 5(3) offers the employer a second opportunity to argue against an award of compensation, in addition to that provided by section 5(1). Compensation can be denied under either argument. It follows that, even where a claimant has satisfied the basic 5(1) conditions, he may still be deprived of compensation under sections 5(2) (b), (d), or section 5(3).

### Section 5(2)(b): Deliberate Self-injury

By virtue of section 5(2)(b), no compensation is payable for any incapacity or death resulting from deliberate self-injury.<sup>10</sup> That this is so is not particularly surprising, and the underlying policy considerations hardly require explication. This provision is separate and apart from the prohibition in section 5(3) regarding serious and wilful misconduct.

Suicide (or attempted suicide) is likely to be the most common form of deliberate self-injury, although it is conceivable, albeit less conceivable, it is submitted, that a worker might maim himself in order to become entitled to employees' compensation.

There is an obvious overlap with the section 5(1) requirement of "accident". A deliberate self-injury is not likely to qualify as an accident in the first place, given that it does not satisfy the plain meaning of that term, nor the case law that has interpreted and applied it.<sup>11</sup> Section 5(2)(b) is there to ensure that result.<sup>12</sup>

As suggested above, there is also a possible overlap with the section 5(1) qualifying condition that the accident arise out of the employment. A deliberate self-injury, for instance a suicide, may very well be found to not arise out of the employment. Section 5(4)(a) deems accidents that arise in the course of the employment to also arise out of the employment, unless there is evidence to the contrary. Evidence of suicide or other deliberate self-injury could easily qualify as evidence to the contrary, thereby defeating the dependant's claim at an early stage and avoiding the need for the court to consider section 5(2)(b).

Finally, there is an overlap with the section 5(3) prohibition concerning "serious and wilful misconduct". Self-infliction of an injury could qualify

<sup>10</sup> As already indicated, there was no similar provision in the UK Compensation Acts on which the Hong Kong legislation is based. Presumably, under that legislation, such cases could be treated and excluded as not concerning accidents arising out of the employment. Nor is there any such provision under the national insurance scheme that replaced those Acts (see Social Security Contribution and Benefits Act 1992, s 94). However, a provision similar to s 5(2)(b) has been adopted in all of the Australian States: see Workers Compensation Act 1951, s 82(2) (Australian Capital Territories); Workers Compensation Act 1987, s 14(3) (New South Wales); Work Health Act, s 57(1)(a) (Northern Territory); Workers' Compensation and Rehabilitation Act 2003, s 129 (Queensland); and Workers Compensation Act 1958, s 6 (Victoria).

<sup>11</sup> Generally, an unlooked for or unexpected event, unexpected from the perspective of the worker: *Fenton v Thorley* [1903] AC 433, at 451. See Glofcheski, n 7 above, pp 5–7.

<sup>12</sup> However, the possibility that a suicide is an accident cannot be ruled out. Warrington LJ opined that a death by suicide could satisfy the requirement of "accident" under the similarly worded provision of the UK Workmen's Compensation Act, if the dependants can prove that at the time the deceased committed suicide he was insane, that the suicide was the result of the insanity, and the insanity was the result of an accident: *Marriott v Maltby Main Colliery* (1920) 13 BWCC 353 at 359. Slesser LJ has since opined that something less than insanity, in the legal sense, can suffice: *Parry v English Steel Corporation Ltd* (1939) 32 BWCC 272 at 274–277. It is to be observed that, on this analysis, it is the event triggering the mental illness, not the suicide, that is the accident, and so a compensation claim could succeed whether or not a suicide was attempted or occurred.

under that section. This is an overlap that has not so far caused problems of interpretation, largely because section 5(2)(b) has rarely been considered by the courts. However, it is an overlap that may cause problems of interpretation one day. Assuming that a deliberate self-injury has been determined to be an accident arising out of the employment, perhaps because a worker's depression was employment-related, it could also be considered as serious and wilful misconduct. In such a case, the court would have to choose between the complete denial of compensation under section 5(2)(b) and the discretion in the case of death or serious incapacity under section 5(3). In such a case the dilemma would be similar to that faced in *Yuen Yuk Ying v Chan Kam Wing*,<sup>13</sup> where a worker driving a motor vehicle while under the influence of alcohol was killed in a motor vehicle accident. In this case the choice for the court was between section 5(2)(d) and section 5(3). The court gave priority to section 5(2)(d), which does not deprive dependants of compensation in the case of death, thereby avoiding the activation of the section 5(3) discretion whether or not to award compensation. This case will be the subject of further discussion below.

The burden of proof of deliberate self-injury is on the employer. This follows from the structure and wording of the provision and of the Ordinance as a whole.<sup>14</sup> Section 5(2) follows immediately after the basic entitlement conditions set out in section 5(1), for which the applicant bears the burden of proof. If those conditions are satisfied, the applicant is *prima facie* entitled to compensation. Section 5(2) can negate that entitlement but only on proof, which naturally must come from he who asserts. However, it should be recalled that it is for the applicant to prove that the injury arose by accident, so this is an issue that the applicant cannot avoid in his argument.

The issue of whether an injury is deliberately self-inflicted is one of fact, to be decided by the judge at first instance alone. This follows because the issue is purely factual in nature, determined by the evidence produced at first instance.<sup>15</sup> Moreover, there is a judicial presumption against a finding of suicide.<sup>16</sup> It was not surprising then that the District Court recently held that the mere fact that there were no witnesses to a worker's death in the course of employment will not without more give rise to an inference that death was caused by deliberate self-injury. In *Ng Mung Khian v Wing Kwong Painting Co*<sup>17</sup> where a paint worker was killed by fire in a storeroom during a lunch

<sup>13</sup> [1997] 1 HKLRD 149.

<sup>14</sup> See also the views expressed on a similarly worded provision in the State of Victoria, in Hill and Bingeman, *Principles of Workers' Compensation* (Sydney: The Law Book Company Limited, 1981), p 143.

<sup>15</sup> See also *Johnson v Marshall, Sons & Co Limited* (n 8 above), where a similar disqualifying provision, concerning serious and wilful misconduct, was held to be an issue of fact.

<sup>16</sup> *Bender v Owners of SS Zent* [1909] 2 KB 41, at 45; *Grime v Fletcher* [1915] 1 KB 734.

<sup>17</sup> (2004) DCEC 749 of 2002.

break in circumstances where there were no eye witnesses who could attest to the cause of the fire, the court rejected the employer's invitation to draw the inference that death resulted from a deliberate self-injury under section 5(2)(b).

Moreover, however much a suicide or a suicide attempt is a self-injury, whether it can be said to be deliberate may in a particular case be an open question. Assuming that the applicant has satisfied the section 5(1) requirements that the suicide arose out of or was aggravated by the employment, and more problematically, that it arose by "accident",<sup>18</sup> the question of the deliberateness of the applicant's action is one that will require consideration by the court. This is very much an open-ended question on which the opinions of experts in the field of psychiatry are likely to diverge. In a recent decision on the subject of suicide in the context of common law negligence and the defences of *volenti non fit injurium* and *ex turpi causa*, the House of Lords settled on the policy position that it matters not whether the suicide victim was of sound or unsound mind, a difficult and dubious distinction at the best of times.<sup>19</sup> If the suicide was caused in part by the defendant's breach of duty of care, the suicide's dependants can succeed in an action in negligence, and will not be deprived of the action under either of the *volenti* or *ex turpi causa* defences, in order to give effect to the duty of care imposed on defendants, such as police or prison officials who have custody of the deceased. However, in the Employees' Compensation Ordinance there is less scope for such judicial policy-making. It is submitted that the applicant would have to show that the mental faculties of the suicide victim were so affected as to make him not in control of his actions, in order to avoid a finding of deliberate self-injury. Or, more accurately, the employer, who has the burden of proof, would have to show the converse, that the suicide victim acted deliberately. This is not necessarily a sure thing. The possibility that a suicide victim can be shown, on the basis of expert evidence, to have not acted deliberately, cannot be ruled out. It is submitted that if in a suicide case the more formidable requirement of "accident" has been satisfied,<sup>20</sup> it will in most such cases be a relatively straightforward matter to show that the self-injury was not deliberate. However, it is rare that a court will have to face this issue, because the application may very well have been stopped at the more demanding section 5(1) "accident" stage, or the equally demanding "arising out of ... the employment" stage.<sup>21</sup>

<sup>18</sup> See nn 11 and 12 above and accompanying text.

<sup>19</sup> *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360.

<sup>20</sup> As discussed in nn 11 and 12 above and accompanying text.

<sup>21</sup> R(1)36/60, decided under the modern UK insurance scheme introduced in 1946 (now the Social Security Contributions and Benefits Act 1992), is an example of a case where a suicide was held to qualify as an accident arising out of and in the course of the employment.



### Section 5(2)(d): Addiction to Drugs or the Influence of Alcohol

This section has no application where death or serious and permanent incapacity results, begging the question as to what constitutes serious and permanent incapacity. It only applies to lesser injuries caused by an accident that is directly attributable to the employee's addiction to drugs or his having been under the influence of alcohol at the time of the accident. There was no comparable provision in the UK Workmen's Compensation Acts, where such claims could be excluded as being injuries attributable to the worker's serious and wilful misconduct. Nor is there any such provision in the national insurance scheme that replaced those Acts.<sup>22</sup> In that legislation, such factors can presumably be taken into account in the consideration of the qualifying provisions, in particular, whether the accident indeed arose out of the employment.<sup>23</sup>

As with section 5(2)(b), the burden of proof that the injury was directly attributable to the worker having been addicted to drugs or under the influence of alcohol is on the employer. Again, the issue is one of fact, to be decided by the judge alone.<sup>24</sup>

It can be observed then that there is overlap with the section 5(1) requirement that the accident arise out of the employment. An accident causing injury to a worker that is attributable to drug addiction or the influence of alcohol could be found under section 5(1) to not arise out of the employment.<sup>25</sup> The fact that the worker was so addicted or was under the influence of alcohol could very well be determined to be "evidence to the contrary" under section 5(4)(a), and could lead to a finding that the accident did not arise out of the employment, despite the section 5(4)(a) deeming provision. In such a case there would be no need to consider section 5(2)(d). Employers are thus afforded two arguments in drugs and alcohol cases.

However, it does not require a stretching of the imagination to contemplate cases where the accident, although occurring in circumstances where the worker was addicted to drugs or under the influence of alcohol, could nonetheless be determined to arise out of the employment. A worker who was injured by accident while performing his work after a work-related lunch

<sup>22</sup> The Social Security Contributions and Benefits Act 1992, s 94, only requires that the "accident arise out of and in the course of the employment"

<sup>23</sup> However, a provision similar to the Hong Kong provision does exist in some of the Australian legislation: see Workers Compensation Act 1951, s 82(4)(a) (Australian Capital Territory); Workers Compensation Act 1958, s 6 (Victoria); Workers' Compensation and Rehabilitation Act 1981, s 22(a) (Western Australia).

<sup>24</sup> See n 15 above, and accompanying text.

<sup>25</sup> See for instance *Nash v Rangatira* [1914] 3 KB 978; see also R(1)5/59, decided under the national insurance legislation that replaced the UK Acts.

accompanied by alcohol,<sup>26</sup> or a driver injured by accident while performing his duties – for instance a long haul which he undertook by fortifying himself with drugs to which he was addicted – could qualify as having been injured by accident arising out of and in the course of employment. It is in these cases that the section 5(2)(d) misconduct provision would be relevant.

A number of observations can be made that require consideration. The section does not speak of addiction to illegal drugs, but to drugs *simpliciter*. Therefore, the reach of the section extends to drugs that may have been medically prescribed, but to which the worker was addicted.

Section 5(2)(d) requires that the accident be directly attributable to the worker having been addicted to drugs or under the influence of alcohol. This imports a causation requirement. The mere fact that the worker is shown to have a drug addiction, or to have been under the influence of alcohol, is obviously not enough. If a worker operating machinery is able to do so well enough, but is nonetheless injured in the operation of that machinery for other reasons, the section should not operate to deprive him of compensation.

This provision was recently applied in *Ma Shiu-wai v Chun Fai Container Transportation Company Limited*.<sup>27</sup> In that case a lorry driver delivering a load of timber in China suffered head injuries when his lorry hit a hole in the road and rolled over. The evidence established that the driver had consumed at least two glasses of wine, if not more. The court appears to have assumed that the injury did not constitute serious and permanent incapacity, a not surprising assumption, given that the loss of earning capacity assessed by the Employees' Compensation (Ordinary) Assessment Board was one per cent. Therefore section 5(2)(d) could operate to deprive him of compensation. As for the attribution issue, the court rejected the applicant's argument that the injury was attributable to holes in the road. The applicant called no witnesses or evidence in support of this argument. In view of the applicant's admission of having consumed two glasses of wine, and according to the evidence, probably more, the court had little difficulty in inferring that the accident was attributable to the influence of alcohol. The application for compensation was denied under section 5(2)(d).

Section 5(2)(d) operates only if the injury results in less than serious and permanent incapacity. To avoid the application of section 5(2)(d) the injury must be permanent, a reasonably clear requirement, but it must also be serious. This expression is not defined in the Ordinance.<sup>28</sup> Therefore, it is left to the

<sup>26</sup> Broadly similar to the fact situation in *Yuen Yuk Ying v Chan Kam Wing* (n 13 above), where the worker under the influence of alcohol was found to have been killed by accident arising out of and in the course of employment. The case is discussed further below.

<sup>27</sup> (2003) DCEC 877 of 2002.

<sup>28</sup> Nor is it defined in the UK Workmen's Compensation Acts, where the expression "serious and permanent disablement" is used.

court's judgment, as a question of fact, as to whether or not the injury constitutes serious and permanent incapacity. The case law provides little guidance. In a typical Employees' Compensation Ordinance claim, it is not necessary to characterise the injury as serious and permanent or not. All claims are admissible, so there is very little case law to which the court can refer.<sup>29</sup> Some examples in the early case law at the lower end of the threshold of serious and permanent incapacity include the loss of the top joint of the first and third fingers,<sup>30</sup> the loss of the top joint of the middle finger,<sup>31</sup> and the loss of sight in one eye.<sup>32</sup> Excluded was a worker who lost the sight in one eye but was found to be capable of continuing in his job on the coalface.<sup>33</sup>

In an early Hong Kong case considering an identically worded provision in the then Workmen's Compensation Ordinance the court appears to have proceeded on the not surprising assumption that amputation of the right index finger and left leg constituted serious and permanent incapacity.<sup>34</sup> More recently in Hong Kong, head injuries resulting in post-concussion syndrome assessed by the Employees' Compensation (Ordinary) Assessment Board as one per cent incapacity were held to not constitute serious and permanent incapacity.<sup>35</sup>

Section 5(2)(d) has recently been the subject of consideration in Hong Kong courts,<sup>36</sup> in particular, its relationship with section 5(3), concerning serious and wilful misconduct, and will be treated below, together with section 5(3).

### Section 5(3): Serious and Wilful Misconduct

A worker who suffers injury that is directly attributable to his serious and wilful misconduct or who deliberately aggravated his injury, will be denied compensation, unless death or serious incapacity results, in which case the court has a discretion whether or not to award compensation.

There was a provision similar to section 5(3) in the UK Workmen's Compensation Acts, but it differed in that if "death or serious and permanent disablement" was caused, compensation would be awarded, and would not be

<sup>29</sup> Sections 7 and 9, dealing with assessment of compensation, refer only to "permanent incapacity"

<sup>30</sup> *Hopwood v Olive and Partington* (1910) 3 BWCC 359.

<sup>31</sup> *Brewer v Smith* (1913) 6 BWCC 651.

<sup>32</sup> *Wood v Garscube Colliery* (1927) 20 BCWW 837.

<sup>33</sup> *Samson v Baird* [1928] SLT 658.

<sup>34</sup> *Lai Tak v Leung Yau Kan* (1961) WCC 67 of 1961.

<sup>35</sup> *Ma Shiu-wai v Chun Fai Container Transportation Company Limited* (n 27 above).

<sup>36</sup> *Ibid.*, and *Yuen Yuk Ying v Chan Kam Wing* (n 13 above).

left to the court's discretion.<sup>37</sup> There is no such provision in the modern UK national insurance scheme that replaced those Acts.<sup>38</sup>

It is to be noted that an approach similar to that in the UK Acts has been adopted in Australia. In all of the Australian States applications for compensation for death or serious incapacity attributable to the worker's serious and wilful misconduct are expressly preserved.<sup>39</sup>

As with sections 5(2)(b) and (d), the burden of proving that the injury was attributable to the serious and wilful misconduct of the employee or that the injury was aggravated by him is with the employer.<sup>40</sup> Moreover, what amounts to serious and wilful misconduct in a given case is a question of fact, to be determined by the judge at first instance.<sup>41</sup>

Also, as with sections 5(2)(b) and (d), this provision can work in conjunction with – and can to some extent duplicate – section 5(1), which requires that the accident arise out of the employment. That is, if a worker's injury is directly attributable to his serious and wilful misconduct or was deliberately aggravated by him, the accident may be found not to have arisen out of the employment under section 5(1), despite the section 5(4)(a) deeming provision. Examples might include a worker engaged in dangerous horseplay, or a worker, with a minor injury, who deliberately aggravates the injury to obtain time off and compensation. The evidence to the contrary, that the accident did not arise out of the employment, could be overwhelming and determinative.

This very sort of overlap occurred in the case of *Cheung Tam Loy v Cheung Hing Construction Company*.<sup>42</sup> The deceased workman, a surveyor's coolie, was engaged with co-workers in the repair of a road. He was not authorised to operate the mechanical shovel used for road repairs, but nonetheless, after the stoppage of work, drove the shovel to continue with repairs. In the course of doing so, the shovel overturned, fell onto and killed the worker. His dependants argued that although the deceased's operation of the shovel in breach of instructions might constitute serious and wilful misconduct, in view of his death, the court had discretion to award compensation under section 5(3). However, this argument was rejected. The court found that the accident did not even arise out of the employment, because the express instructions

<sup>37</sup> Workmen's Compensation Act 1925, s 1(b).

<sup>38</sup> As already pointed out, such factors are taken into account when considering the basic qualifying conditions: see n 23 above and accompanying text.

<sup>39</sup> See Workers Compensation Act 1951, s 82(3) (Australian Capital Territory); Workers Compensation Act 1987, s 14(2) (New South Wales); Work Health Act, s 57(1)(b) (Northern Territory); Workers' Compensation and Rehabilitation Act 2003, s 130(1) (Queensland); Workers Compensation Act 1958, s 6 (Victoria); and Workers' Compensation and Rehabilitation Act 1981, s 22(c) (Western Australia).

<sup>40</sup> For an authority, see *Johnson v Marshall Sons & Co Ltd* (n 8 above) at p 411.

<sup>41</sup> *Ibid.*, at p 415.

<sup>42</sup> (1958) WCC 30 of 1957.

to the effect that he was not to drive the shovel took the accident outside the course of employment. This seems a rather harsh decision, in view of section 5(4)(b),<sup>43</sup> which deems acts done for the purposes of and in connection with the employer's business to arise out of and in the course of his employment, notwithstanding that the employee was acting without instructions. Nonetheless, the principle is clear, that the application of the section 5(1) requirement may in appropriate circumstances render a consideration of section 5(3) unnecessary.

Similarly, injury in circumstances just described may not qualify as "accident" under section 5(1), for reasons similar to those discussed above regarding sections 5(2)(b) and (d). In such a case there would be no need for the court to consider section 5(3).

Section 5(3) has great scope for depriving a worker of compensation, although in practice it is rarely resorted to. The serious and wilful misconduct need not be the sole cause of the accident, it need only be an attributable cause. Moreover, not every kind of misconduct will trigger section 5(3). "Wilful" imports that "the misconduct was deliberate and not merely a thoughtless act on the spur of the moment".<sup>44</sup> And "serious" means "not that the actual consequences were serious, but that the misconduct itself was so".<sup>45</sup> Misconduct is serious when, by its nature, it endangers lives and/or safety.<sup>46</sup> And so a workman, under instructions that the lift could be used only if carrying a load, and who nonetheless used the lift without a load, and who was killed when the lift malfunctioned, was not guilty of serious and wilful misconduct.<sup>47</sup> The risk of death was not increased – nay, possibly decreased – by using an unloaded lift.

A modern local example also illustrates the principle. A worker who was injured while unloading goods from a lorry, the tailgate of which he knew to be defective, was not guilty of serious and wilful misconduct. Such misconduct was not sufficiently serious, having regard to the risks created, to give rise to the application of the section.<sup>48</sup>

Serious and wilful misconduct relates to conduct prior to or at the time of the accident.<sup>49</sup> Therefore, an employee who refused western medical treatment in favour of allegedly negligently administered traditional Chinese medical treatment, and whose injuries were allegedly worsened by that

<sup>43</sup> Section 5(1) in the then current version of the Ordinance.

<sup>44</sup> *Johnson v Marshall Sons & Co Ltd* (n 8 above), p 411.

<sup>45</sup> *Ibid.*, pp 411–412.

<sup>46</sup> *Ibid.*, p 413.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Chan Ka Leung Bee v Golden Island Metal Manufactory* (2005) DCEC 813 of 2003.

<sup>49</sup> *Lai Tak v Leung Yau Kan* (n 34 above); *Chang Sanchez, Au Candalaria, on behalf of Estate of Deceased v Hin Sum Manpower Company Limited* (2005) DCEC 859 of 2002.

treatment, was not caught by the provision.<sup>50</sup> And an employee who suffered from gangrene due to pebbles trapped in his boots, and who delayed medical treatment and continued to smoke after the accident, was not guilty of serious and wilful misconduct within the meaning of the section.<sup>51</sup>

In fact, such conduct is more appropriately dealt with as an issue of causation. In *Lai Tak v Leung Yau Kan*<sup>52</sup> the court held that the employee's decision to opt for traditional Chinese medical treatment, which in the result, may have worsened his condition, should be treated as an issue of causation, in which case the relevant question was whether the substandard traditional Chinese medical treatment constituted a *novus actus interveniens*, thereby breaking the chain of causation. The court found insufficient evidence in support of the argument that the injury arose from the medical treatment rather than the work-related accident, and awarded full compensation.<sup>53</sup> And in *Chang Sanchez, Au Candalaria, on behalf of Estate of Deceased v Hin Sum Manpower Company Limited*, the court similarly found no evidence to the effect that the employee's delay in obtaining medical treatment and his continuing to smoke cigarettes caused or contributed to his injury.<sup>54</sup>

Routine contributory negligence as understood in the common law will not attract the application of section 5(3). After all, the Ordinance is remedial, its purpose to provide compensation in the routine circumstances of work, which will often be stressful and constrained by the pressures of time and production quotas, and may therefore be performed with less than due care.

Mere infringement of instructions or regulations does not in itself amount to serious and wilful misconduct. In the leading case, a worker's use of an unloaded lift when express instructions prohibited the use of lifts without a load, although constituting misconduct, did not constitute serious and wilful misconduct.<sup>55</sup> This must be right, and the only possible interpretation in view of the expansive wording in the section 5(4)(b) deeming provision, to the effect that any act done by the employee "for the purposes of and in connection with the employer's trade or business" is deemed to arise out of and in the course of the employment, notwithstanding that it was done in contravention of any regulation or of any orders given or in the absence of instructions.

<sup>50</sup> *Lai Tak v Leung Yau Kan* (*ibid*).

<sup>51</sup> *Chang Sanchez, Au Candalaria, on behalf of Estate of Deceased v Hin Sum Manpower Company Limited* (n 49 above).

<sup>52</sup> Note 34 above.

<sup>53</sup> This situation is to be distinguished from s 16(7), concerned with a worker's unreasonable refusal to see a medical practitioner when his employer has requested him to do so. In such cases, if the injury is found to have worsened as a result of the refusal, compensation will be awarded in a reduced amount, according to the likely extent of the injury if the worker had not so refused.

<sup>54</sup> For a more comprehensive discussion of the causation issue see Glofcheski (n 7 above), at pp 7–13.

<sup>55</sup> See *Johnson v Marshall, Sons & Co Limited* (n 8 above).

A recent example of its application is found in *Ng Mung Khian v Wing Kwong Painting Co*,<sup>56</sup> where a paint worker on a lunch break who died in a fire while preparing materials for the resumption of work, was determined to have died in the course of employment, although work had not formally resumed. Since the work could easily be interpreted to be for the purposes of and in connection with the employer's business, it was deemed to be in the course of the employment by section 5(4)(b), which by its terms applies even though the work was not done pursuant to the employer's instructions.

Similarly, in *Chan Ka Leung Bee v Golden Island Metal Manufactory*, a worker unloading goods using a lorry tailgate that he knew to be defective could rely on the presumption in section 5(4)(b) because the work was done "for the purpose of and in connection with his employment".<sup>57</sup> Moreover, and not surprisingly, such conduct did not constitute serious and wilful misconduct under the Ordinance.<sup>58</sup>

It will be recalled that where death or serious incapacity results, the court has a discretion whether or not to award compensation to the employee or his dependants. The Ordinance provides no guidance as to how the discretion is to be exercised, and therefore the exercise of discretion is a somewhat open-ended issue for the trial judge, to be determined "in all of the circumstances of the case". *Yuen Yuk Ying v Chan Kam Wing*<sup>59</sup> concerned an employee driving his employer's van while under the influence of alcohol, who collided with a road-sweeping vehicle and was killed. For reasons to be discussed below, Godfrey JA determined that section 5(2)(d) applied to the exclusion of section 5(3). However, in considering the possible application of section 5(3) and the discretion contained therein, Godfrey JA said that the expression "in all the circumstances of the case" should be construed widely, and that the court is entitled to take into account "all the circumstances of the case as revealed by the evidence; all the circumstances peculiar to the accident; and all the circumstances peculiar to the victim."<sup>60</sup> Specific factors to be considered in that case included the facts that the deceased was able to drive safely for 25 minutes, that he left behind a widow and two children, and that he comes within the apparent policy of the legislature, underlying section 5(2)(d), to treat dependants of employees killed under the influence of alcohol with a degree of leniency.<sup>61</sup> Moreover, on a reconsideration of the facts, the major cause of the accident was not alcohol, but an "error of judgment

<sup>56</sup> Note 17 above.

<sup>57</sup> See n 48 above.

<sup>58</sup> Applying *Johnson v Marshall* (n 8 above).

<sup>59</sup> Note 13 above.

<sup>60</sup> *Ibid.*, p 154.

<sup>61</sup> *Ibid.*

enhanced by alcohol". In the court's view, all of these factors pointed to the proper exercise of discretion in favour of the applicant.<sup>62</sup>

In *Ng Mung Khian v Wing Kwong Painting Co*,<sup>63</sup> a paint worker was killed by fire in a storeroom during lunch break in circumstances where there were no eyewitnesses who could attest to the cause of the fire. The court held that even if the deceased worker's conduct were to be viewed as serious and wilful misconduct under section 5(3) on the unsupported theory that the fire was caused by the careless lighting of a cigarette, following the judgment of Godfrey JA in *Yuen Yuk Ying v Chan Kam Wing*,<sup>64</sup> the court's discretion should be exercised in favour of the applicant in view of the worker's death, and in view of the fact that he left behind a widow, a child and an aged father.

From these decisions little is offered in the way of guidance as to how the section 5(3) discretion should be exercised. However, it is apparent that little is required to activate the exercise of discretion in the applicant's favour, whether the deceased's death or serious and permanent incapacity is alcohol-influenced or not. The court appears to be motivated by the underlying policy to save applications in cases where the worker is killed or seriously and permanently incapacitated, whatever the nature of the serious and wilful misconduct.

#### *Relationship with Section 5(2)(d)*

Section 5(3) and section 5(2)(d) present something of a conundrum. On the one hand, section 5(2)(d) preserves the entitlement to compensation where death or serious incapacity results from the employee's addiction to drugs or his having been under the influence of alcohol. This is obviously a policy-driven provision, ensuring that an award of compensation will be made to the members of the deceased worker's family, or to the seriously incapacitated worker, so as not to leave the applicants destitute. On the other hand, under section 5(3), where death or injury results from the serious and wilful misconduct of an employee, the question of entitlement to compensation is discretionary. There is a contradiction because serious and wilful misconduct is a description that could equally apply to an employee killed or seriously incapacitated as a result of drug addiction or having been under the influence of alcohol. If the death or serious incapacity resulting from drug addiction or alcohol abuse is treated by the court as resulting from serious and wilful misconduct under section 5(3), the applicant may be denied compensation in the exercise of discretion under that section, despite the saving of the entitlement to compensation by the wording of section 5(2)(d).

<sup>62</sup> *Ibid.*

<sup>63</sup> Note 17 above.

<sup>64</sup> Note 13 above.



This contradiction was addressed in *Yuen Yuk Ying v Chan Kam Wing*.<sup>65</sup> In that case, an employee driving his employer's van under the influence of alcohol, collided with a road-sweeping vehicle and was killed. At trial, compensation was denied under section 5(3), the accident having been determined to be attributable to the worker's serious and wilful misconduct, and the discretion exercised against the applicant. The case was re-considered on appeal to the Court of Appeal. Godfrey JA said:

"By enacting section 5(2)(d) the legislature has gone out of its way to treat the influence of alcohol on the employee as irrelevant, in the case of a fatal accident, to the right to claim compensation. It would in our opinion produce a nonsense if the dependants of the employee, having had their right to compensation preserved by 5(2)(d), were to have it taken away from them altogether (or left as a matter of court's discretion) by the treatment of the same facts as serious and wilful misconduct for the purposes of 5(3). We are therefore of the view that section 5(3) can have no application to the present case ..."<sup>66</sup>

In other words, as a matter of statutory interpretation, death or serious incapacity which results from the ingestion of alcohol should never be equated with serious and wilful misconduct, because the influence of alcohol or addiction to drugs are dealt with otherwise in section 5(2)(d). If correct, this is a powerful ruling, and means that injury or death by virtue of addiction to drugs or the influence of alcohol can never constitute serious and wilful misconduct, thereby preventing the application of section 5(3) and the discretion contained therein, to alcohol and drug cases where death or serious and permanent incapacity results.

Godfrey JA went on to consider the position if he was wrong on this point, that drug addiction or working under the influence of alcohol could constitute serious and wilful misconduct. He held that "if the employee's job is, as here, one which involves driving a motor vehicle (in unsafe hands, a lethal weapon) on a highway, any degree of impairment, due to the voluntary ingestion of alcohol, which has the effect of dulling the driver's senses, slowing his reaction time and dulling his senses, does constitute serious and wilful misconduct".<sup>67</sup> However, for the reasons discussed above, Godfrey JA exercised the section 5(3) discretion in favour of the applicants.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*, p 152.

<sup>67</sup> *Ibid.*, pp 153–154.

*Where Worker not Killed*

In applying sections 5(2)(d) and 5(3) in circumstances where the worker was not killed, and in circumstances where the evidence is clear that the worker was under the influence of alcohol or drugs at the time of the accident, the court will have to make two determinations: the court will first have to decide whether the worker was seriously incapacitated; and the court will then have to decide whether the inference can be drawn that the accident was *attributable* to drug addiction or the influence of alcohol. If both determinations are made in the affirmative, then according to *Yuen Yuk Ying v Chan Kam Wing*, the application will necessarily succeed, and section 5 (3) will have no relevance to the determination. However, if the injury is not thought to be seriously incapacitating, although it is proved to have been caused by accident attributable to drug addiction or the influence of alcohol, the application for compensation will be denied, either under section 5(2)(d) or section 5(3). The issue of attribution is an issue of causation that should not be overlooked.

In *Ma Shiu-wai v Chun Fai Container Transportation Company Limited*,<sup>68</sup> where a lorry driver under the influence of alcohol was delivering a load of timber in China, the driver's head injuries were found not to constitute serious and permanent incapacity. Moreover, regarding the attribution issue, the court found the accident to be attributable to the driver being under the influence of alcohol. The application for compensation was denied under section 5(2)(d). Although the court did not expressly deny compensation by reference to section 5(3), it is submitted that it could have done so. Firstly, the section 5(3) discretion had no application because the applicant was not killed or seriously incapacitated. And secondly, the court expressly referred to and adopted the principle articulated by Godfrey JA in *Yuen Yuk Ying v Chan Kam Wing*<sup>69</sup> to the effect that driving under "any degree of impairment due to the voluntary ingestion of alcohol which has the effect of dulling the driver's senses ..." constitutes serious and wilful misconduct.

## Conclusion

From the foregoing it can be seen that a worker's conduct may be relevant to the success of his or his dependants' claim for compensation, despite the essentially no-fault character of the Employees' Compensation Ordinance. The relevant provisions, as worded, are unique to Hong Kong, and are not without problems of interpretation and possible contradiction. Firstly, the

<sup>68</sup> Note 27 above.

<sup>69</sup> Note 13 above.

workers' misconduct provisions overlap with the basic qualifying conditions. The application may be denied for reasons that the basic qualifying conditions cannot be satisfied. Even if they are satisfied, the misconduct provisions are not easy of application, involving as they do, internal contradictions.

On those few occasions when the misconduct provisions have been considered, the court has generally taken a broad and purposive approach in the interpretation of the legislation, whether in the determination of what constitutes serious and permanent incapacity, or in the determination of what constitutes an accident attributable to the influence of alcohol or addiction to drugs. However, it is now clear that driving while impaired will always be treated as serious and wilful misconduct, for obvious policy reasons.

Nonetheless, the statutory framework of provisions concerned with workers' misconduct does not present an elegant picture, and in cases where those provisions are relevant, will give rise to unnecessarily protracted legal argument. It is submitted that a more coherent approach would be to do as did the drafters of the UK Acts on which the Hong Kong legislation is based, and roll sections 5(2)(b), (d) and 5(3) into one provision, preserving (as in the UK Acts) all applications where the worker has been killed or seriously incapacitated (save where the death or injury is self-inflicted), while leaving scope for the court to disallow applications where the conduct, whether alcohol, drug-related or otherwise, constitutes serious and wilful misconduct. After all, the applicant has already passed through the already technical layer of qualifying conditions in section 5(1). This is an incremental proposal, keeping intact the basic framework, and stopping short of abolishing the "serious and wilful misconduct" provision, as has been done in the modern UK national insurance scheme, where such issues are determined under the basic qualifying conditions. This approach will embody the humanitarian policy implicit in the reasoning of Godfrey JA in *Yuen Yuk Ying v Chan Kam Wing*<sup>70</sup> as well as that adopted in the original UK Acts and the Australian legislation, by preserving the application for compensation for the dependants or the injured worker where death or serious incapacity results. The decision whether to award compensation where death or serious incapacity results should not be left to the court's discretion, in order to reflect a humanitarian policy, and because the basis on which such a discretion should be exercised is completely unclear. Deliberate, self-inflicted injuries should still be excluded, for obvious policy reasons, and this exception can be built into the same provision. Of course this will still leave a large element of open-ended discretion to the court in the determination of what constitutes serious and wilful misconduct in cases of ordinary injury, but there is already a body of case law on which to build a modern jurisprudence.

<sup>70</sup> See n 66 above and accompanying text.

